83-816

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SALVADOR MERAZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAYMOND C. CABALLERO
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521 Texas Avenue
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QUESTIONS PRESENTED

1. Whether the double jeopardy clause bars Appellant's prosecution for the same acts for which he was previously convicted by the State of Texas.

2. Whether the government's failure to follow the Petite policy denies Appellant due process.

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LIST OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, SALVADOR MERAZ, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. A1-4) is unreported. No opinion was issued by the District Court.

JURISDICTION

The opinion of the Court of Appeals was entered on October 20, 1983 (Appendix A, pp. A1-4). No motion for rehearing was filed by Appellant. This Court has jurisdiction to consider the case under Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in part as follows: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On July 10, August 13, and October 21, 1980, Appellant made sales of cocaine to an undercover state agent. He was arrested and thrice indicted by state authorities for possession of cocaine on October 21, 1980, and for delivery of cocaine on July 10 and August 13, 1980. Appellant thereafter entered a plea of guilty to all three indictments and was sentenced to serve ten years on each indictment, the sentences to be run concurrently; however, Appellant was placed on supervised probation once he had completed serving 60 days "shock probation" at the state penitentiary. Appellant will complete his probated sentence in 1990.

Thereafter, Appellant was charged in a one-count information with possession with the intent to distribute cocaine in violation of Section

841(a)(1) of Title 21, United States Code. Appellant's former attorney on the state court charges testified that the same conduct formed the basis for both the state and federal charges. It was conceded by the trial court and by the government that the state charges were identical to the federal charges. The U. S. Attorney's office also stipulated that they had not obtained the necessary Department of Justice approval for the federal prosecution. Appellant entered a plea of guilty to the federal charges under a plea agreement which would allow him to appeal so as to raise the impropriety of a second prosecution by the government for the same conduct. Appellant was thereafter sentenced to a term of three years: six months to serve and two and one-half years probated for five years. Appellant then filed this appeal.

REASONS FOR GRANTING THE WRIT

1. Since its decision in Abbate v. United States, 359 U.S. 187 (1959), this Court has consistently held that successive state and federal prosecutions based on the same acts do not violate the double jeopardy clause of the fifth amendment. Also see Bartkus v. Illinois, 359 U.S. 121 (1959). The double jeopardy clause was enacted "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense" and prohibits the government from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity . . ." Green v. United States, 355 U.S. 184, 187 (1957).

Appellant respectfully contends that the holding of Abbate v. United States, supra, is in error and should be reversed. The Abbate decision rests upon the rationale that under our system of federalism, both the state and nation are sovereigns and an act defined as a crime by both state and national sovereignties "is an offense against the peace and dignity of both and may be punished by each." United States v. Lanza, 260 U.S. 377 (1922).

The Bill of Rights was enacted to protect basic individual liberties from encroachment by government. The double jeopardy clause has been held to prohibit an individual from being put twice in jeopardy by successive prosecutions by a state or from being twice put in jeopardy by successive federal prosecutions. Furthermore, as Justice Black pointed out in his

dissenting opinion in Abbate, "it has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction," 359 U.S. 189, 203. The Abbate rule allows the state and federal governments together to take action which is constitutionally condemned if taken by either independently. Such a distinction is untenable where the interest of the individual to be free from successive prosecutions for the same conduct is identical regardless of what sovereignty is seeking to prosec te.

Appellant in this case pleaded guilty in state court to three indictments involving the possession and delivery of cocaine. He was convicted and sentenced on the state charges. Thereafter, identical federal charges were brought against Appellant based on

the same conduct. Appellant filed a motion to dismiss the federal charges as violative of the double jeopardy clause and the Petite policy. Petite v. United States, 361 U.S. 529 (1960). Upon denial of the motion, Appellant entered into a plea agreement under which he would plead guilty but would be allowed on appeal to raise the impropriety of the second prosecution by the federal government for the same conduct. Upon entry of a guilty plea, the federal charges resulted in a second conviction and sentence. In the words of Justice Black:

> It is just as much an affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense. 359 U.S. 189, 203 (Black, J. dissenting).

2. After the Bartkus and Abbate opinions were published by the Supreme Court, the Department of Justice announced its policy that it would not prosecute persons previously charged by the state for the same offense unless there were compelling reasons and the Assistant Attorney General had granted permission to do so. This act of self-restraint by the government has come to be known as the Petite policy. Petite v. United States, supra. The primary purpose of the Petite policy is to protect an individual from the unfairness associated with successive prosecutions for the same conduct. Rinaldi v. United States, 434 U.S. 22 (1977).

In this case the government has stipulated that the requisite Department of Justice approval was not obtained. Further, the record reflects no

compelling reason for subjecting Appellant to a second prosecution. Since the government is clearly in violation of its own policy, Appellant is entitled to inform the Department of Justice so that it can follow its own procedures and dismiss this action. Watts v. United States, 422 U.S. 1032 (1975). Cf. United States v. Wallace, 578 F.2d 735 (8th Cir. 1978); and United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978).

Agencies of the federal government are bound by the rules and regulations which they promulgate. Accardi v. Shaughnessy, 347 U.S. 260 (1954). In Pacific Molasses Company v. F.T.C., 356 F.2d 386 (5th Cir. 1966), this Court said:

> When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. See Service v. Dulles, . . . This is so even when the defined procedures are "* * * generous beyond the

> requirements that bind such agency * * *." . . . For once an agency exercises its discretion and creates procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. 356 F.2d at pp. 389, 390.

Contra, Beckwith v. United States, 425 U.S. 341 (1976).

The government's failure or refusal in this case to follow its own established policy, even if that policy is not constitutionally mandated, denies Appellant due process of law. Appellant is entitled to rely upon a long-standing and frequently articulated policy of the government, designed primarily to protect individuals such as himself from multiple prosecutions for the same offense. Appellant respectfully disagrees with the Fifth Circuit's holding that a statement, letter, or press release of the Attorney General does not constitute an official policy statement

of the Department of Justice on which the public and the courts may rely. See United States v. Hayes, 589 F.2d 811, 818 (5th Cir. 1979), cert. den. 444 U.S. 847. The Petite policy has been recognized repeatedly by the courts since its inception, Petite v. United States, supra; Watts v. United States, supra; Rinaldi v. United States, supra; United States v. Wallace, supra; United States v. Hays, supra; and unless and until the Department of Justice modifies or eliminates the policy, it should be recognized as an official promulgation of that department.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

By: _____
RAYMOND C. CABALLERO

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1402
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SALVADOR MERAZ,

Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

(October 20, 1983)

Before CLARK, Chief Judge, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

Salvador Meraz pleaded guilty in state court to charges of possession and delivery of cocaine. Subsequently, a federal grand jury indicted him for conspiracy to possess marijuana and cocaine and with intent to distribute.

In accordance with a plea agreement, a superseding information was filed to allege possession of cocaine. After the court had explained to him the rights he would be waiving and the maximum penalty he would face, Meraz entered his guilty plea.

The plea agreement expressly reserved Meraz's right to appeal on the basis of a Petite policy violation. The U.S. Attorney prosecuting Meraz's case conceded that he had deviated from the Justice Department's internal policy in failing to obtain the Department's approval to prosecute Meraz for federal crimes arising from the same acts that gave rise to the state prosecution. The district court denied Meraz's motion to dismiss the federal charges on the basis of the Petite policy violation. We affirm.

On appeal, Meraz argues that although there is no constitutional proscription against federal prosecution for criminal acts that have previously given rise to state convictions, the government's violation of the Petite policy nevertheless constitutes grounds for dismissing the federal indictment.

This court has already considered and rejected such an argument. "[W]hile we recognize that agencies of the federal government are bound by the rules and regulations which they officially promulgate, we are not prepared to hold that a . . . statement [such as the Petite policy] . . . which is not promulgated as a regulation of the Justice Department and published in the Federal Register, can serve to invalidate an otherwise valid indictment returned by the Grand Jury." United States v. Hayes, 589 F.2d 811, 818 (5th

Cir.) (citation omitted), cert. denied, 444 U.S. 846 (1979).

The judgment of the district court is

AFFIRMED.